



May 14, 2019

VIA ONLINE PORTAL

U.S. Department of Housing and Urban Development
Freedom of Information Act Office
451 7th Street SW, Room 10139
Washington, DC 20410-3000
Submitted via Online Portal

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations for the U.S. Department of Housing and Urban Development (HUD), 24 C.F.R. Part 15, American Oversight makes the following request for records.

In April 2018, HUD announced a proposal that would have greatly increased rent for the people least able to afford it. The proposal would have tripled a family's monthly minimum rent and increased the percent of income other renters pay their landlords from 30 to 35%.¹ The Center on Budget and Policy Priorities estimated that the proposal would have affected 4,144,700 households and increased the average annual rent by \$780, putting a heavy burden on many families.² This proposal, if enacted, could have increased rent beyond what people can afford and pushed families out of their homes.

American Oversight seeks to shed light on any communications with external groups that may have influenced the proposal's development and any studies HUD conducted before announcing it.

Requested Records

American Oversight requests that HUD produce the following within twenty business days:

¹ Tracey Jan, *HUD Secretary Ben Carson's Proposal to Triple Rents for Poorest Households Would Hurt Single Mothers the Most*, WASH. POST, Apr. 27, 2018, https://www.washingtonpost.com/news/wonk/wp/2018/04/27/hud-secretary-ben-carsons-proposal-to-triple-rents-for-poorest-households-would-hurt-single-mothers-the-most/?utm_term=.f1774df97290.

² *Trump Plan Would Raise Rents on Working Families, Elderly, People With Disabilities*, CTR. ON BUDGET & POLICY PRIORITIES (APR. 27, 2018, 10:00 AM), <https://www.cbpp.org/blog/trump-plan-would-raise-rents-on-working-families-elderly-people-with-disabilities>.



Any final studies or analyses conducted or obtained by HUD in connection with its proposed bill entitled “Making Affordable Housing Work Act of 2018.”³

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.⁴ **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**⁵

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered your agency’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**⁶ Furthermore, agencies that have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies, now maintain emails in a

³ Making Affordable Housing Work Act of 2018, *available at* <https://www.hud.gov/sites/dfiles/Main/documents/RentReformLegislativeText.pdf>.

⁴ *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); *cf. Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

⁵ *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

⁶ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

form that is reasonably likely to be more complete than individual custodians' files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁷ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁸ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”⁹ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹⁰

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹¹ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, your agency is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

⁷ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphases in original).

¹⁰ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹¹ *Mead Data Central*, 566 F.2d at 261.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 24 C.F.R. § 15.106(k), American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to public understanding of those operations. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”¹² The requested records are directly and clearly related to HUD’s operations and activities, as they relate to a proposal concerning one of HUD’s core missions: to support families and individuals in need of housing assistance and affordable housing.¹³

Furthermore, these records are “‘likely to contribute’ to an increased public understanding of those operations or activities” by providing additional context and information to the public concerning a controversial housing proposal.¹⁴ This HUD proposal, if passed, could increase rent for approximately 4,144,700 households and risk pushing people into homelessness.¹⁵ Households with the lowest income could see their rent increase threefold. Renters, landlords, and other members of the community each have an interest in understanding any outside influence underpinning this proposal. This request could help members of the public living in HUD housing better understand the impetus for this proposal that would increase their rents. Accordingly, there is a “reasonably broad audience of persons interested in the subject” (beyond just the requester), to whom, as described in more detail below, American Oversight has the capacity and intention to distribute any records received in response to this request.¹⁶ Furthermore, there is currently limited information available to the public concerning the subject matter of this request, including potential influences on HUD’s policy proposal, and any analysis in which HUD engaged before making its announcement. Therefore, “[t]he public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, should be enhanced by the disclosure to a significant extent” by disclosure of the requested records.¹⁷

¹² 24 C.F.R. § 15.106(k)(1)(i).

¹³ See 24 C.F.R. § 15.106(k)(2)(i).

¹⁴ See 24 C.F.R. § 15.106(k)(2)(ii).

¹⁵ CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 2.

¹⁶ 24 C.F.R. § 15.106(k)(2)(iii).

¹⁷ 24 C.F.R. § 15.106(k)(2)(iv).

In addition, this request is primarily and fundamentally for non-commercial purposes.¹⁸ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹⁹ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,²⁰ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.²¹ As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.²²

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with you on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Katherine Anthony at foia@americanoversight.org or 202-897-3918. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,



Austin R. Evers
Executive Director
American Oversight

¹⁸ 24 C.F.R. § 15.106(k)(1)(ii), (3).

¹⁹ American Oversight currently has approximately 12,200 page likes on Facebook and 54,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 14, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 14, 2019).

²⁰ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²¹ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

²² *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.